

SUPREME COURT OF NIGERIA

6TH JULY, 2012. SC. 379/2001

**CORAM:- A. M. MUKHTAR, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC**

1. BEN E. CHIDOKA

2. VICTORIA CHIDOKA APPELLANTS

AND

FIRST CITY FINANCE CO. LTD RESPONDENT

LEGAL PRACTITIONERS - Case law - Citation - Counsel must cite case with clarity - Providing inter alia name of the law report - Or a certified true copy - Where case is unreported (H1)

LEGAL PRACTITIONERS - Negligence - Conduct of case - Counsel is master of his case - As he may decide not to call witness - Or cross-examine witness of the other party - But may be sued for professional negligence (H2)

COURTS - Processes - Abuse - Need to avoid - Case ought to be determined within reasonable time - As no court would allow party - To abuse it (H3)

FAIR HEARING - Breach - Complaint of - Where opportunities were given to party to present his case - But he failed to utilize same - Then he cannot complain of denial of fair hearing (H4)

COURTS - Issues - Binding nature of - Court is bound to consider - Issues properly placed before it - As it does not fish out issues for parties (H5)

MONEY LENDING - Evidence - Admitted facts - Briefs of appeal - Since appellants expressly agreed that - Respondent was not a money lender - Respondent has nothing to prove (H6)

FACTS

Plaintiff/respondent commenced this action against defendants/

appellants at the High Court of Lagos State, claiming the sum of N486,780.00k being debt owed arising from loan facilities it granted appellants. After close of respondent's case, appellants sought for several adjournments in order to open their defence. When it became clear that appellants were not ready to present their defence, the court proceeded to hear respondent's address and adjourned for judgment. Subsequently, the court granted claims of respondent.

Dissatisfied, appellants appealed to the Court of Appeal, Lagos contending that the agreement between the parties was illegal on the ground that respondent was not a licensed money lender. They further contended that they were not given fair hearing at the trial court. The court held that the issue of illegality was not raised between the parties. The court also held that appellants failed to utilize opportunities offered to defend the action. The court thus dismissed the appeal and affirmed judgment of the trial court. Aggrieved further, appellants filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

1) *"Whether the rule laid down in the Supreme Court's judgment of Okunbor v. Obiazi delivered on 1/7/1969 in SC 746/66 which makes it mandatory for a trial court to call upon a defendant to take over the conduct of his case when his counsel refuses to proceed, is still good law so that failure of the learned justices of the Court of Appeal to follow same and reverse the judgment of the trial court for its non-observance occasioned a miscarriage of justice to the appellant.*

2) *Whether the lower court rightly ignored the rule against enforceability of ex-facie illegal contract to uphold the judgment for recovery of money lent at 132% interest per annum by plaintiff/respondent an unlicensed money lender contrary to Section 2 of the Money Lender's Law and Order 3 rule 8 of the High Court of Lagos State (Civil Procedure) Rules 1972."*

HELD (Unanimously dismissing the appeal per
MUNTAKA-COOMASSIE JSC)

LEGAL PRACTITIONERS - Case law - Citation

1. On the issue 1 the appellant heavily relied on the unreported

case of Okunbor V. Obiazi suit No. SC.746/66, which contained some extracts of the decisions. The learned counsel did not state the page and this has made me to spend some hours going through 846 page - digest. At last I was able to locate some quotation from the case at pages 486 and 511. I must say this act is most unfair to this court. A counsel who wants the court to make use of the authorities cited must provide and cite the cases with clarity, i.e. the name of the parties, the year the case was delivered, if it is unreported a certified true copy, where the case has been reported, the name of the law report, the year, volume and the page. To dump authorities on the court without clear reference, that would not be accepted by this court. I must also say that citing case from the digest which did not state the facts of the case is most unuseful to this court. Cases are decided on the facts presented in court and form the basis of the court's decision. Where the facts of the case are not known, the court would not be in the right position to know how the decisions were reached. Digest is only a lead that enables one to look for the full decision of the court and not to cite extracts or quotation the basis of which were not known. (p. 2595 G)

LEGAL PRACTITIONERS - Negligence - Conduct of

2. To my mind, this is not a case of withdrawal of counsel from a case; it is a case of where a counsel exercised his discretion not to call any witness in his case. A counsel is a master of the case he conducts. He may decide not to call any witness or even cross examine the witness or witnesses of the other party. However, where a counsel negligently conducts his client's case, he is liable to be sued for professional negligence. (p. 2597 C)

COURTS - Processes - Abuse - Need to avoid

3. The appellants were represented in court, and the 2nd defendant was also present. They deliberately refused to offer any evidence in their defence and tried to foist a position of helplessness on the court. No court worth its salt would allow any party to a case to abuse its court. A case ought to be

heard and determined within a reasonable time. A situation, as in this case, where the appellants' have severally sought for adjournments to amend their statement of defence, and on the day fixed for defence, no such application was filed and at the same time the counsel deliberately refused to call any evidence even though the 2nd defendant was present in court is an act that should not be permitted. The trial court was clearly right in closing the defence case and proceeding to take the plaintiff address. The lower court was right in upholding the trial court's decision. (p. 2597 E)

FAIR HEARING - Breach - Complaint of

4. In this case, the right to fair hearing of the appellants was not in any way breached. They were given sufficient opportunity to present their defence but they were using delay tactics to delay the cause of justice. Where opportunities, as in this case, have been given to a party to present his case and he fails to make use of such opportunities then he cannot complain of denial of fair hearing. The court cannot force a party to present his case, where such party fails; the court is entitled to make appropriate order in order to ensure that justice is done. (p. 2597 H)

COURTS - Issues - Binding nature of

5. As a preliminary point I must state that I have perused the statement of claims, and the statement of defence and I could not see where issue of the illegality was raised. To make the matter worse, the appellants did not utter any evidence in defence or in support of their statement of defence. It is settled law that the court is only bound to consider and determine issues properly placed before it. It cannot embark on its voyage to fish out issue for parties. It is my view that this issue having not been raised in the pleadings before the trial court is not worthy of any determination. (p. 2598 C)

Evidence - Admitted facts - Effect

6. As earlier pointed out, the appellants have stated that the respondent is not money lender, how can the provisions of

the Money Lenders law (supra) be applicable to him? Apparently, the appellants were in this state of confusion when they submitted in their brief of argument that the respondent is deemed by law to be a Money Lender and had the primary burden of proving if not admitted, the facts that showed exemption from companies with licensing requirement of the money lender law. The submission is of no moment. The appellants have expressly agreed and admitted that the respondent was not a Money Lender, hence there was nothing left for the respondent to prove. Consequently, I also resolve this particular issue against the appellants and in favour of the respondent. (p. 2599 G) B
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REPRESENTATION

Toyin Bashorun (Mrs.), for the Appellants

Mathew Nkap, for the respondent

D

CASES REFERRED TO

Ajani v. Giwa (1986) 3 NWLR (pt. 32) 796

Igbinomwanbia v. NTA (1995) 6 NWLR (pt. 403) 631

Ijeh v. Onwuachi (1994) 3 NWLR (pt. 332) 288

Fetuge v. Western Nigeria Housing (1967) NSCC Vol. 5 274

Forcados Ovo Obodo v. Staford Olomu (1987) 3 NWLR (pt. 59) 11

Adewunmi v. Plastex Ltd. (1985) 3 NWLR (pt. 32) 767

Alao v. ACB (1998) 3 NWLR (pt. 542) 339

Pan Bisbuilder Nig. Ltd v. FBN Ltd (2000) 1 NWLR (pt. 642) 647

Enang v. Adu (1981) 11-12 SC 25

Akeredolu v. Akinremi (1989) 3 NWLR (pt. 108) 164

Ibodo v. Enarofa (1980) 5-7 SC 42

Veritas Insurance v. Citi Trust Investment Ltd (1993) NWLR (pt. 281)

Ibrahim v. Osim (1988) 3 NWLR (Pt. 82) 357-379

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G

STATUTES REFERRED TO

Money Lenders Law Cap 133 Laws Lagos State 1994

Banking & other Financial Institutions Decree No. 25 of 1991

H

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The respondent, who was the plaintiff at the trial court claimed

jointly and severally against the appellants the sum of N486, 780.00k being the debt owed as at 30th July, 1989 arising from the loan facilities granted the defendants/appellants in accordance with Agreements C.P/214 dated 20th December, 1986 and C.P/214 - A dated 19th December, 1986 entered into by the plaintiff and defendants at defendants' request.

The facts of this case as agreed by the parties in their respective brief of argument are this. The contract between the parties was contracted in 1987 between the respondent, as lender, and the appellants, as borrowers. The appellants are couple doing business together. The money lent was to attract interest at the rate of 132% per annum. The respondent was not a licensed Money Lender at the time it entered into the transaction nor as at the time it sued to recover what was allegedly owing under the contract. This action was brought under a summary judgment procedure, however the trial court transferred it to the general cause list in order to hear and determine the case on merit. Thereafter the plaintiff/respondent proceeded to prove its case and after the close of its case defendants' counsel sought for an adjournment for the defence to open, but as the record shows, the counsel abandoned the case without the leave of court. The plaintiff/respondent was duly cross-examined by the defendants' counsel on 6/12/90 after which the plaintiff's case was closed. All the consequent adjournment on 12/12/90, and 22/2/1991, were at the instances of the defendants/appellants. Thereafter a new counsel was briefed to defend the appellants - Mr. Alao Aka - Bashorun (of blessed memory). The defendants on the 14/4/91 sought an adjournment to study the case; it was thus adjourned at his instance to 30/4/91.

On that day the learned counsel was not in court, rather he has sent a lawyer to the court who said that he knew nothing about the case. It must be noted that on the 4/4/91 Mr. Alao Aka - Bashorun specifically asked for the adjournment in order to enable him file an amended statement of defence, but as at date of the case, nothing has been filed. The trial court while refusing an application for adjournment held thus at page 136 of the record:

"I have myself gone through the court's case filed and nothing has been filed in connection with an amended statement of defence which Mr. Alao Aka-Bashorun vigorously spoke about on 4th April

1991 when the same case came up. One of the two defendants is present in court. Since the plaintiff has closed its case I would presently call on the second defendants' counsel to present the defendants' own case. If the defendant is not ready to present her case then I shall be constrained to conclude that she does not wish to call any evidence.....” B

At this point the defendant's counsel, Mr. Ajayi said and I quote, “I am not in a position to ask the 2nd defendant if she has any defence to offer”

In response, the learned trial court ruled as follows:-

“I shall therefore at this stage take it that the 2nd defendant does not wish to call any evidence. It is pertinent to recall here that the plaintiff closed its case on 6th December 1990. I regard the cases on both sides closed and I shall now listen to the final address”. C

The trial court proceeded to hear the plaintiffs address and adjourned for judgment. That court delivered its judgment on 12/7/91 in which the plaintiff/respondent's claims were granted. Dissatisfied with this judgment the appellants unsuccessfully appealed to the Court of Appeal, Lagos Division, hereinafter called the lower court. On 8/5/2000 the lower court dismissed the appeal and affirmed the judgment of the trial court. On the issue of the illegality of the agreement between the parties, which the appellants contended was illegal on the ground that the respondent not being a licensed Money Lender could not operate as such under the provisions of the Money Lenders Law of the Lagos state cap. 58, the lower court held thus:- D E F

“The issue of the application of money Lenders Law Cap 58 of Lagos State was neither raised nor contested between the parties. There is nothing on record to suggest that the claims of the respondent in the trial court was ex-facie illegal. There is neither pleading G nor evidence on record on extraneous issue of the application of money Lenders Law now sought to be pressed before this court ... Even if the issue of illegality was raised suo motu by the trial court, nothing precluded it from looking into relevant statutory provisions and case law that deal with the issue, it would seem to me that by the provisions of Section 2 (2) of the Money Lenders Law Cap 58 the respondent is entitled to enter into the kind of contract it entered with the appellant. Appellant, having duly taken benefit from the transaction leading to the suit herein cannot be heard to say that the H

transaction is illegal because they are now being asked to fulfill their obligation under the contract”.

Finally, on the issue of fair hearing the lower court held as follows:-

B *“Where counsel refused to open his defence in spite of several invitation of the court the appellant and the counsel cannot be heard to complain that the appellants’ constitutional right to fair hearing as enshrined in Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 was denied them”.*

C It was on these grounds that the lower court dismissed the appeal. It was against this decision that the appellants have further appealed to the Supreme Court. In accordance with the rules of this Court both parties filed and exchanged their respective, briefs of argument. The appellants in their joint brief of argument formulated D two (2) issues for determination as follows:

E 1) *“Whether the rule laid down in the Supreme Court’s judgment of Okunbor v. Obiazi delivered on 1/7/1969 in SC 746/66 which makes it mandatory for a trial court to call upon a defendant to take over the conduct of his case when his counsel refuses to proceed, is still good law so that failure of the learned justices of the Court of Appeal to follow same and reverse the judgment of the trial court for its non-observance occasioned a miscarriage of justice to the appellant.*

F 2) *Whether the lower court rightly ignored the rule against enforceability of ex-facie illegal contract to uphold the judgment for recovery of money lent at 132% interest per annum by plaintiff/respondent an unlicensed money lender contrary to Section 2 of the Money Lender’s Law and Order 3 rule 8 of the High Court of Lagos G State (Civil Procedure) Rules 1972.”*

The respondent also formulated two (2) issues for determination as follows:

H *“(1) Considering especially that non of the two counsel engaged by the defendants/appellants at various times was re-adjourned for the hearing of their case after several adjournments for that purpose, were the learned Justices of the Court of Appeal not justified in validating the procedure adopted by the trial court of finally closing the defendants’ case and delivering judgment accordingly after address of the Plaintiff/Respondent’s counsel.*

(2) Was the lower court not right in upholding the trial court's finding that it was not open to the defendant's/appellants who had benefitted from a contract to turn around to evade their obligation under that contract on the basis of its purported illegality".

At the hearing before us, the learned Senior Counsel to the appellant adopted its brief of argument and urged this Court to allow the appeal. On the 1st issue, learned counsel commenced by positing that where a counsel seised of an action which is ripe for hearing refuses to proceed with his client's case in a situation where the client so represented is himself present in court, should the court forcibly close the case of the client ipso facto or should the court call upon the client himself to personally take over the conduct of his case before concluding it. That defence did not wish to call evidence and foreclosing same. Counsel contended that the answer could be found in this Court's decision in *Okunbor V. Obiazi* delivered on 11/7/1969 in SC/746/66 contained in volume 9 Digest of the Supreme Court cases by Gani Fawehinmi, the decision which he said has been followed in *Ajani v. Giwa* (1986) 3 NWLR (Pt.32) 796 at 809, *Igbinomwanbia v. N.T.A.* (1996) 6 NWLR (pt.403) 631 at 637, *Ijeh v. Onwuachi* (1994) 10 NWLR (Pt.332) 288 at 294 and *Fetuga V. Western Nigeria Housing* (1967) NSCC Vol. 5 page 274 /278. He therefore submitted that the lower court misdirected itself when it failed to follow the above cited decisions. Learned counsel further contended that the decisions in *Alhaji Lawal Tanbi Vs. Israel Opawoye* (2000) 4 NWLR (Pt.644) P275; *Eco consult Ltd. v. Panche Villa* (2000) 3 NWLR (Pt.647) 141; and *Ajidanun v. Ajidanun* (2004) 4 NWLR (Pt.654) 600 cited by the lower court are not applicable to this case.

On the 2nd issue it was the contention of the learned counsel that the claim was a money lending transaction at an interest rate of 132% per annum and that the lender was not at the material time a licensed Money Lender. It was therefore contended that no doctrine of ex-facie illegality operates so that if an action really rests on a contract which on the face of it ought not to be enforced then the court ought to dismiss the claim irrespective of whether the pleadings of the defendant raise the question of illegality, the case of *NORTH WESTERN SALT CO. LTD. V. ELECTRONIC ALKALI CO. LTD.* (1914 - 1915) All E.R. (reprint) 752) was cited. Learned counsel therefore contended that the respondent was an illegal and unlicensed

money lender within the meaning of Section 1, 2(c), 4 and 72 of the money lenders Law cap 85 Laws of Lagos state. And as such it cannot maintain an action to recover money lent in breach of the money Lenders Law cites the case of Daroiha V. Hussain (1958) NSCC vol. 155 at 59. Therefore in the case of ex-facie illegality consideration of whether the un-enforceability will make one of the parties to the illegal transaction unjustly enriching himself is irrelevant. Learned counsel also referred to order 2 Rule 8 of the High court of Lagos state (civil proceedings) 1972 and submitted that the respondent was a Money Lender.

Learned counsel finally submitted that the respondent is deemed by law to be a Money Lender and he had the primary burden of pleading and if not admitted proving the facts that showed its exemption from compliance with the lending requirement of the Money Lenders Laws. Learned counsel for the respondent also adopted his brief before us and urged this court to dismiss the appeal.

On his 1st issue formulated by him it was his contention that the case of Okunbor v. Obiazi (supra) is not only inapplicable in this case but also excerpt from that judgment was distorted, the condition upon which the decision and pronouncements in Okunbor's case turned were the absence in court or sudden withdrawal of the defendant's counsel, and none of this happened in this case. Learned counsel went on to distinguish the decisions in Igbinomwanbia v. N.T.A. (supra), Ijeh v. Onwuachi (supra) and Fetuga v. Western Nigeria Housing (supra) cited by the appellant's counsel and submitted that they are not only irrelevant but also inapplicable to the present case. It was then contended that counsel, unless specifically instructed to the contrary, as regard a particular course of action, has well unfettered powers regarding what to do or not to do, concerning his client's case in court. These include whether or not to call a witness, Cross-examine a witness or not, reach a compromise on the case and withdrawal of an appeal without reference to his client. The case of Adewunmi V. Plassex Ltd (1986) 3 NWLR (pt. 32) 767 was cited.

On the 2nd issue, learned counsel submitted that the lower court was right in agreeing with the trial court in applying the principle of law that a party who has benefited from a transaction cannot be heard to set up any supposed illegality in the contract to defeat the enforcement of his own obligation under the contract or agree-

ment. Responding to the appellant's argument that the transaction is ex-facie illegal, learned counsel referred to his writ of summons, the statement of claim and the statement of defence and contended that these processes reveal that;

1. the respondent financed, on the basis of the written agreement the appellant' export of shrimps at its request at a total sum of N210,000.00; B

2. the appellants issued to the respondent two post dated cheques for the total payment of N256,000.00 towards the repayment of loan.

3. the cheques were dishonoured upon their presentation and upon the commencement of this suit. The appellant denied their liability on the ground that the contract is illegal. It was these issues that the trial court resolved at the trial. C

It was further submitted that there is nothing on the face of these issues on the pleadings which gives an indication of ex-facie illegality of the transaction, learned counsel therefore submitted that courts are bound by the issues properly raised before them and no party would be allowed to change his case as it moves up the ladder of the judicial system, the case of Lasisi Ogbe V. Sule (2009) 18 NWLR (pt. 1172) 106 was cited. The issue of applicability of the Money Lenders Law of Lagos State was not raised nor was it adverted to in the trial court. He therefore urged this court to dismiss the appeal. D

My lords I wish to state before I proceed further that I have examined the two issues for determination distilled by each of the parties and I discovered that they are in essence saying the same thing the difference is only in semantic. However for the purpose of the determination I will adopt the issues for determination formulated by the appellant. E

On the issue 1 the appellant heavily relied on the unreported case of Okunbor V. Obiazi suit No. SC.746/66, which contained some extracts of the decisions. The learned counsel did not state the page and this has made me to spend some hours going through 846 page - digest. At last I was able to locate some quotation from the case at pages 486 and 511. I must say this act is most unfair to this court. A counsel who wants the court to make use of the authorities cited must provide and cite the cases with clarity, i.e. the name of the par- F
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ties, the year the case was delivered, if it is unreported a certified true copy, where the case has been reported, the name of the law report, the year, volume and the page. To dump authorities on the court without clear reference, that would not be accepted by this court. I must also say that citing case from the digest which did not state the facts of the case is most unuseful to this court. Cases are decided on the facts presented in court and form the basis of the court's decision. Where the facts of the case are not known, the court would not be in the right position to know how the decisions were reached. Digest is only a lead that enables one to look for the full decision of the court and not to cite extracts or quotation the basis of which were not known.

As I earlier stated in this judgment at page 486 of the digest stated the principle of non - interference with the discretion of the trial Judges if they refuse to grant an adjournment in appropriate case while page 511 stated the position when a court withdraws from further participation in a case and the need to allow parties to a case to conclude their case by hearing the witness or witnesses intended to call. The relevant passage at page 511 is the statement of Ademola CJN (as he then was) to the effect that:-

“There is another point on which we think attention should be called. When a counsel is not in court but his client is present, or when counsel withdraws from a case as Mr. Agbakoba did in this case (although there is nothing in the Judge's note to say that the application was refused nor granted), it is the duty of the Judge to ask the client to carry on with his case where his counsel left off. The learned Chief Justice in the instant case when Mr. Agbakoba stated he was not taking further part in the proceedings owed a duty to the appellants. They were to be informed of the withdrawal of their counsel and should have been called upon to carry on. Instead learned Chief Justice adjourned the case for judgment”.

The appellants' counsel also cited the case of Ajani V. Giwa (1986) 3 NWLR (pt.32) 796 at 809, the statement of Oputa JSC (as he then was) dealing with the situation where the defendant was not present in court. The learned jurist stated the position as follows:-

“Calling on a defendant whose counsel was not present in court to give evidence and call his witness is not a question of discretion; it

is a duty incumbent on the trial court judge discharged that duty at p. 31 lines 30 - 33 thus:

The situation is explained by the court to the defendant personally. He is told that he can proceed with his case and call as many witnesses as he likes”.

The question is what is the position of this case? On the 30/4/91, a date fixed for defence at the instance of the appellants’, the appellants were represented by one Mr. T. Ajayi of counsel. The court now called the counsel to call the 2nd defendant or any other witness he may wish to call. This is what the learned counsel said:-

“I am not in a position to ask the 2nd defendant if she has any defence to offer”.

To my mind, this is not a case of withdrawal of counsel from a case; it is a case of where a counsel exercised his discretion not to call any witness in his case. A counsel is a master of the case he conducts. He may decide not to call any witness or even cross examine the witness or witnesses of the other party. However, where a counsel negligently conducts his client’s case, he is liable to be sued for professional negligence. See Adewunmi V. Plastex Ltd (1986) 3 NWLR (pt.32) 767. Hence, all the authorities as cited on whether the trial court was right in closing the defendants case when the counsel withdrew are inapplicable to this case. ***The appellants were represented in court, and the 2nd defendant was also present. They deliberately refused to offer any evidence in their defence and tried to foist a position of helplessness on the court. No court worth its salt would allow any party to a case to abuse its court. A case ought to be heard and determined within a reasonable time. A situation, as in this case, where the appellants’ have severally sought for adjournments to amend their statement of defence, and on the day fixed for defence, no such application was filed and at the same time the counsel deliberately refused to call any evidence even though the 2nd defendant was present in court is an act that should not be permitted. The trial court was clearly right in closing the defence case and proceeding to take the plaintiff address. The lower court was right in upholding the trial court’s decision.*** See Ajayi V. Giwa (1986) 3 NWLR (pt.32) 796. ***In this case, the right to fair hearing of the***

appellants was not in any way breached. They were given sufficient opportunity to present their defence but they were using delay tactics to delay the cause of justice. Where opportunities, as in this case, have been given to a party to present his case and he fails to make use of such opportunities then he cannot complain of denial of fair hearing. The court cannot force a party to present his case, where such party fails; the court is entitled to make appropriate order in order to ensure that justice is done.

In all, I resolve the first issue against the appellants. The 2nd issue deals with the alleged ex-facie illegality of the transaction by virtue of the provisions of the Money Lenders Law of Lagos State Cap. 85. Section 1, (2) (c) thereof.

As a preliminary point I must state that I have perused the statement of claims, and the statement of defence and I could not see where issue of the illegality was raised. To make the matter worse, the appellants did not utter any evidence in defence or in support of their statement of defence. It is settled law that the court is only bound to consider and determine issues properly placed before it. It cannot embark on its voyage to fish out issue for parties. See Lasisi Ogbe V. Sule Asane (2009) 18 NWLR (pt. 1172) 106. It is my view that this issue having not been raised in the pleadings before the trial court is not worthy of any determination.

However, even if it was raised, can the respondent be said to be a Money Lender or licenced Money Lender also make the provisions of the Money Lenders Law applicable to it? The appellants cannot admit in his brief of argument that the respondent was not a money lender or a registered Money Lender. In this respect I find the view expressed by Okoro JCA useful in Alhaji Abdullahi Ibrahim v. Mallam Zangina Abubakar Bakori suit No. CA/K/292/2006, un-reported delivered on 2/7/2009 (Court of Appeal Kaduna Division) and I wish to adopt it in this judgment. At pages 21-23, the learned Justice of the Court of Appeal held as follows:-

“A person engaged in other businesses who out of sympathy or pressure as in this case lends money to his friend to resuscitate his ailing business should not by any stretch of imagination be termed Money Lender under the law aforesaid. I seem to agree with the

view expressed by Farewell J. In Lintch Filed V. Dreyful (1906) 1 K.B 554 at 559 that-

The Act was intended to apply only to persons who are really carrying on the business not to person who lend money as incidental business or to a few friends”.

He continues and says: -

“Though not binding authority, I agree that the view so expressed represents the correct position of the law in this matter. I am always not comfortable at the practice where a party after seeking and obtaining money from a friend for resuscitation of his ailing or dwindling business will turn around to rely on technicalities or loopholes in the law as a cover to absolve himself from contractual obligations by putting up a defence under Money Lender Law as done by the appellants in this case. This is pes-simi exempli of business relations and this court would not lend support for such a party to bite the finger that fed him and deprive him of his hard earned money. A man who, with his eyes open and without the other party committing any fraud against him, enters into an agreement with another, should be prepared to abide by the terms of the agreement illegal or otherwise un-enforceable in law. I cannot allow the appellants, after collecting money from the respondent to do business, to now turn around to plead the Money Lenders law in order to escape the refund of the said money as governed by Exhibit ‘A’ between them. It is on this note that I agree with the learned trial Judge that based on the pleadings and the evidence before the court the respondents are not Money Lenders under the Money Lenders Law of Kaduna State (Supra). Accordingly, Exhibit ‘A’ is not governed by the Law”.

My lords, though I am not bound by the above exposition of the law, I agree that the statement represents the law and as such permit me to adopt same as mine. **As earlier pointed out, the appellants have stated that the respondent is not money lender, how can the provisions of the Money Lenders law (supra) be applicable to him? Apparently, the appellants were in this state of confusion when they submitted in their brief of argument that the respondent is deemed by law to be a Money Lender and had the primary burden of proving if not admitted, the facts that showed exemption from companies with licensing requirement of the money lender law. The submission is of**

no moment. The appellants have expressly agreed and admitted that the respondent was not a Money Lender, hence there was nothing left for the respondent to prove. Consequently, I also resolve this particular issue against the appellants and in favour of the respondent.

B Finally, I hold that the appeal is devoid of any merit and it is accordingly dismissed. The judgment of the lower court upholding the trial court's decision is hereby affirmed. One hundred thousand naira (N100, 000.00) costs are awarded to the respondent.

C _____

MUKHTAR JSC, CFR

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Muntaka-Coomassie JSC. I am in complete agreement with the reasoning and conclusion reached in the lead judgment that the appeal lacks merit. The appeal revolves around the principle of fair hearing, which the appellants to my mind are stretching to a ridiculous extent.

It is my belief that the concept of fairing cannot extend to a situation whereby a court is held to ransom by unreasonable and deliberate inaction by a party who seeks to delay a court's proceedings. Reasons for delay in the dispensation of justice have always been laid on the door step of the courts and this should not be tolerated. In this wise I endorse the decision of the two lower courts. I also dismiss the appeal, and abide by the order on costs.

CHUKWUMA-ENEH JSC

G I have read before now the judgment in this matter prepared by my learned brother Muntaka-Coomassie JSC with which I agree. My learned brother has treated satisfactorily the issues raised for determination. I agree with his reasoning and conclusion. I also dismiss the appeal lacking in merit and I endorse the consequential orders contained in the lead judgment.

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PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on the 8th day of May, 2000. The judgment was in respect of two consolidated appeals against an interlocutory decision of Silva J. refusing leave to amend the statement of defence of the Defendants/appellants and proceeding to deliver the final judgment of the court in the suit on the same date against the defendants/appellants. The Notice of appeal against the decision of the Lower court was filed on the 2nd day of May, 2000 and contained three grounds of law and misdirection in law directed only at the portions of the judgment that affirmed the final judgment of the trial Court. **FACTS BRIEFLY STATED:**

The cause of action in this matter at the Court of trial arose from a money lending transaction. It was contracted in 1987 between the respondent as lender and the appellants as borrowers. The appellants are a married couple doing business together. The money lent was to attract interest at the rate of 132% per annum. The respondent was not a licensed money lender at the time it entered into the transaction nor as at the time it sued to recover what allegedly owed there-under. It was neither a licensed financial institution, nor of a non-bank financial institution status created in 1991 under the Banking and other Financial Institutions Decree No.25 of 1991 (BOFID). After the trial court had dismissed an application by the respondent for summary judgment holding that the defendants had disclosed a triable defence, the matter proceeded to trial. At the close of the case for the plaintiff/respondent, the appellants' original counsel sought adjournment for the defence to open, but it turned out thereafter that the counsel merely used the opportunity of the adjournment to abandon the case without leave of the court.

The abandonment made the appellant get a new counsel, Messrs Alao Aka-Bashorun & Co which new counsel was denied the opportunity to lead evidence or give a final address. His prayer for adjournment was refused. What transpired at the Court of trial captured by Appellant would be recast below as follows:-

“THURSDAY THE 30TH DAY OF APRIL, 1991 BEFORE THE
HON. MR. JUSTICE A.O. SILVA JUDGE
SUIT No. LD/1669/89

BETWEEN:

FIRST CITY FINANCE COMPANY LIMITED - PLAINTIFF

AND

1. BEN E. CHIDOKA

2. VICTORIAL CHIDOKA

- DEFENDANTS

B Plaintiff represented by A. Agwu

1st defendant absent

2nd defendant present

Chief A.C. Tagbo for plaintiff

C Mr. T. Ajayi for Aka-Bashorun for defendants

MR. AJAYI: I most sincerely apologize for the absence of Mr. Aka-Bashorun. He travelled out to Port Harcourt and left instructions for Mr. Falana to take up the matter in court today. Mr. Falana who had himself gone to Warri to attend to another matter was expected D back in Lagos yesterday but up to now, he has not returned. I got hold of the file and decided to be in court today. I am not seised of the facts of this matter. I respectfully ask for adjournment.

CHIEF TAGBO: Mr. Aka-Bashorun came into this case on the last adjourned date and said he would file an amended statement of E defence. This was on 4th April, 1991. No amended statement of defence has up to now been served on me. This is another trick to further delay this case. Learned counsel who is in court for the defendants this morning has by his own admission no knowledge of the facts of this case. Mr. Aka-Bashorun who came into this case has not F filed any papers in connection with the amended statement of defence which he spoke about on the last adjourned date. I urge the court to allow me present my final address if the defendants will not give evidence.

G COURT: I have myself gone through the court's file and nothing has been filed in connection with an amended statement of defence which Mr. Alao Aka-Bashorun vigorously spoke about on 4th April, 1991 when the case last came up. One of the two defendants is present in court. Since the plaintiff has closed its case, I would H presently call on this 2nd defendant's counsel to present the defendant's own case. If the 2nd defendant is not ready to present her case then I shall be constrained to conclude the she does not wish to call any evidence. Mr. Ajayi should now call the second Defendant or any other witness he may wish to call.

MR. AJAYI: I am not in a position to ask the 2nd Defendant if she has any defence to offer.

COURT: I shall therefore at this stage take it that the 2nd Defendant does not wish to call any evidence. It is pertinent to recall here that the plaintiff closed its case on the 6th December 1990. I regard the cases on both sides closed and I shall now listen to final addresses. B

CHIEF TAGBO ADDRESSES THE COURT.

"...I urge the court to grant the reliefs sought in the writ of summons."

MR. AJAYI: I shall convey to my senior in chambers details of today's proceedings. I am not able to say anything else as I am not seized of the matter. I respectfully ask for adjournment. C

COURT: Judgment is reserved till 24th May, 1991.

From the foregoing narrative in the records, it is evident that one of the defendants was present. The learned trial judge forcibly CLOSED THE CASE AND RESERVED JUDGMENT WITHOUT FIRST CALLING ON THE DEFENDANTS/APPELLANTS TO PERSONALLY PROCEED WITH THE CASE WHEN A JUNIOR COUNSEL APPEARING FROM THE FIRM OF THEIR NEW SOLICITORS CONFESSED HIS INABILITY TO GO ON WITH THE CASE on account of being unfamiliar with the facts. When again the plaintiff counsel concluded his address and the defendants' counsel was still unwilling to address, the Court simply proceeded (sic) to adjourn for judgment without calling on the present defendant 2nd appellant to make her final address. PERSONALLY after her lawyer refused to address the court on her behalf. D E F

Judgment was eventually entered for the plaintiff/respondent in the sum of four hundred and eighty six thousand, seven hundred and eighty naira (N1486, 780.00) made up of principal and interest at the rate of ONE HUNDRED AND THIRTY TWO PERCENT (N132%) PER ANNUM at the time of the judgment in the High Court. Of note is that the credit facility was secured with five different collaterals which list of securities is contained in EXHIBIT 4 at page 169 of the record which included a mortgage on appellant's landed properties. Before the institution of the action plaintiff/respondent had levied a pre-emptive extra judicial execution on three of the appellants' properties pledged as securities for the loan namely:- G H

- (a) 2 Nos Franiger deep freezers.
- (b) one number Honda (sic) 4500 model generating set.
- (c) second mortgage on landed property at Enugu.

The plaintiff/respondent had sued for the entire sum allegedly due with interest and judgment was granted in its favour in what
B Appellant termed a one-sided trial as detailed above. On appeal to the Court below, that Court upheld the judgment/ruling that the appellants' right to fair hearing had not been breached by the procedure adopted by the learned trial judge in reaching its judgment.
C Aggrieved, the Appellant has appealed to this Court. During hearing on the 17th day of April 2012, the learned counsel for the Appellants' adopted the Appellants' Brief settled by A. J. Owonikoko filed on 25/11/05. In the Brief were formulated two issues for determination which are thus:-

D 1. Whether the rule laid down in the Supreme Court judgment of *Okunbor v. Obiazi* delivered on 1/7/1969 in SC/746/66 which makes it mandatory for a trial court to call upon a defendant to take over the conduct of his case when his counsel refuses to proceed, is still good law so that failure of the learned justices of the Court of
E Appeal to follow same and reverse the Judgment of the trial court for its non-observance occasioned a miscarriage of justice to the appellant.

2. Whether the Lower court rightly ignored the rule against
F enforceability of ex-facie illegal contract, to uphold the judgment for recovery of money lent at 132% interest per annum by plaintiff/respondent, an unlicensed money lender contrary to section 2 of the Moneylender's Law, and order 3 Rule 8 of the High court of Lagos state (civil procedure) Rules, 1972.

G The Respondent through counsel adopted and relied on the Brief of argument settled by F.C.A. Okoli Esq. filed on 13/4/2012 and deemed filed on 17/4/12. In the Brief were crafted two issues which are, viz:

H 1. Considering especially that none of the two Counsel engaged by the Defendants/Appellants at various times was ready for the hearing of their case after several adjournments for that purpose, were the learned Justices of the court of Appeal not justified in validating the procedure adopted by the Trial Court of finally closing the defendants' case and delivering judgment accordingly after address

of the plaintiff/Respondent's counsel?

2. Was the Lower Court not right in upholding the trial court's finding that it was not open to the Defendants/Appellants who had benefited from a contract to turn around to evade their obligation under that contract on the basis of its purported illegality.

The issues as raised by the Appellants seem more apt to utilize B and so I shall make use of them.

ISSUE NO. 1:

Whether the rule laid down in the Supreme Court judgment of OKUNBOR v. OBIAZI delivered on 1/7/1969 in SC/746/66 which makes it mandatory for a trial Court to call upon a defendant to take C over the conduct of his case when his counsel refuses to proceed is still good law so that failure of the learned justices of the Court of Appeal to follow same and reverse the judgment of the trial court for its non-observance occasioned a miscarriage of justice to the appel- D lant.

Learned counsel for the Appellant submitted that the Justices of the Court of Appeal misdirected themselves in not following the decisions in the three cases, viz:- Ajani v. Giwa (1986) 3 NWLR (pt. 32) 796 (SC), Igbinomwanbia v. NTA (1995) 6 NWLR (pt.403) 631 E at 637, 638, Ijeh v. Onwuachi (1994) 3 NWLR (pt.332) 288 at 294, Fetuge v. Western Nigeria Housing (1967) NSCC Vol. 5 Page 274 at 278. Mr. Owonikoko of counsel said that the applicability of the above decisions to the undisputed facts of this case, the Lower court for- F aged into irrelevant antecedents of the case before the date on which the alleged breach of fair hearing was occasioned. That appeal was anchored on that breach alone, as it was the business before judg- ment was reserved and delivered against appellants. He stated that Lower court applied cases that were not in tune with the circum- G stances of this case and thereby came to a wrong decision. That the breach of fair hearing occasioned, consisted in the fact that the trial Court's failure to follow the procedure enjoined by OKUNBOR's case foreclosed the right of the appellants to lead evidence in support of their statement of defence and also to make a final address. He cited H the case of Forcados Ovo Obodo v. Staford Olomu & Anor (1987) 3 NWLR (pt.59) 11 at 120.

Mr. Okoli learned counsel for the Respondent contended that the principle outlined in Okunbor v. Obiazi (supra) was not in any

way breached by the trial court for the major reason that the facts are different as regards the essential requirement of absence or withdrawal of counsel. That counsel unless specifically instructed to the contrary as regards a particular course of action has unfettered powers regarding what he is to do or not do concerning his client's case in court. He said these include whether or not to call a witness, cross-examine a witness or not, reach a compromise on the case and withdrew an appeal without reference to his client as occurred in the leading case of *Adewunmi v. Plastex Ltd.* (1985) 3 NWLR (pt.32) 767. Mr. Okoli said it is not within the powers of a court to inquire into the authority of counsel who announces appearances for a party and that the Lower court's decision is and remains unimpeachable.

In answer to the question posed in Issue 1 recourse would be had in going into the judgment of the Court of Appeal per Galadima JCA (as he then was) in its consideration of what the trial Court did. That Court held:-

*"I have observed earlier on that the plaintiff closed its case and the case had been fixed for judgment at the time when the Defendants sought the leave of Court to amend their Statement of Defence to plead a fresh issue of illegality. They had pleaded an illegality arising from an alleged infraction of Foreign Exchange Regulations in their amended Statement of Defence. They however, did not call evidence in support of the averment. This amendment proposed, having been brought after the Respondent had addressed the court and the case was adjourned for judgment is intended to overreach, embarrass or surprise the respondent who would now not have opportunity to react to the amendment sought to be made. Having regard to the facts and circumstances of this case the learned trial judge was right in refusing the Appellant's application to further amend their Statement of Defence. It was brought mala fide intended to overreach by the Appellants. It is not shown that the exercise of his discretion is manifestly wrong, arbitrary, reckless or injurious. I cannot interfere with it. See *University of Lagos v. C.I.O. Olaniyan* (1985) 1 NWLR (Pt. 1) 156."*

The court of Appeal captured properly the essence of what was at play at its forum and at the Court of first instance. Indeed, there is no peg upon which this Court can hang a reason for departure from what either of the two Courts below did and it is not for this

Court first on a whim of fancy or to show that it can do things differently to interfere in a discretion so well exercised by the trial court and which the court of Appeal basing its stance on the facts and circumstances on ground agreed with. It goes without saying therefore that this issue is resolved against the Appellant in that the rejection of the trial Court of the Defendants' attempt to amend their statement of Defence at the point of judgment was in order supported by the circumstances and the miscarriage of justice and the overreaching of the Respondent that would have resulted if a contrary decision was made by the trial court in allowing the amendment. The floating of the lack of fair hearing as against the Appellants do not hold water as there is nothing in support thereof. B C

ISSUE 2:

Was the Lower court not right in upholding the Trial court's finding that it was not open to the Defendants/Appellants who had benefitted from a contract to turn around to evade their obligation under that contract on the basis of its purported illegality. D

Mr. Owonikoko, learned counsel for the Appellant said the issue here is whether the claim as constituted in this case was *ex-facie* illegal and thus unenforceable that the point taken on the illegality was that the claim was a money lending transaction at an interest rate of 132% per annum and that the lender was not at the material time a licensed money lender. That the parties are one on the fact that the plaintiff/respondent founded its action on its presumed status as a finance company. That the doctrine of *ex-facie* illegality operates so that if an action really rests on a contract which on the face of it ought not to be enforced, then the court ought to dismiss the claim irrespective of whether the pleadings of the defendant raise the question of illegality. He referred to *North Western Salt Co Ltd. v. Electrolytic Alkali Co Ltd (1914 - 1915) All ER Reprint 152*. Mr. Owonikoko said this was the situation in the case in hand where an action for recovery of debt contracted by an unlicensed money lender at 132% interest per annum was granted by the trial court and upheld by the Court of Appeal. That when this action was instituted in 1989 the only law which authorised anybody to engage in money lending not being a bank or Insurance Company was the Money Lenders Law of Lagos State. Therefore any unlicensed money lender was required to obtain an exemption license to so operate and it is in this category that E F G H

the plaintiff/respondent fell. He cited Sections 1, 2, (c), 4 and 12 of the Money Lenders Law. Cap 85 Laws of Lagos State, 1973 (Re-enacted as Cap 133 Laws Lagos State 1994).

B For the appellant it was submitted that the Plaintiff /Respondent could not maintain an action to recover money lent in breach of that Law aforesaid. He cited *Da Rocha v. Hussain* (1958) NSCC Vol. 1 Page 55 at 59; Banks & Other Financial Institutions Decree No. 25 of 1991. That the High Court of Lagos State (Civil Procedure) Rules 1972 applicable to this case, made it mandatory that in an action for money lent at an interest, the plaintiff must plead the authority by which it lent the money in its statement of claim. He cited Order 3 Rule 8 of the High Court of Lagos State (Civil Procedure) 1972; *Alao v. ACB* (1998) 3 NWLR (Pt.542) 339 at 355; *Pan Bisbuilder (Nig.) Ltd v. FBN Limited* (2000) 1 NWLR (pt.642) 647 at 598.

D In response, Mr. Okoli for the Respondent said finding an answer to the Issue 2 above would require only an examination of the writ of summons given that the definition of *ex facie* means “on its face”, so that one does not need any light as may be shed on the transaction by the statement of defence to appreciate its illegality. He stated that for our purpose here there is need to go beyond the writ of summons to also examine the amended statement of defence and reply to it and when that happens the following would show:-

F (i) The Respondent which is a finance company financed, on the basis of a written contract, the appellants’ export of shrimps to United Kingdom by lending to them a total sum of N210, 000.00.

(ii) The Appellants issued to the Respondent two post dated cheques for the total sum of N255, 000 towards repayment of the loan.

G (iii) Respondent presented the cheques on the due dates and they were dishonoured and the Appellants who were aware of this development refused/neglected to otherwise make good their indebtedness.

H (iv) In response to the Respondent’s suit for recovery of the money, the Appellants denied liability on the ground that the contract was illegal, repayment having been provided for in foreign currency i.e. pounds Sterling.

Learned counsel for the Respondent stated that it was on these issues, and no more, that the trial revolved. The Respondent’s sole

witness was cross-examined by Appellants' counsel on the issue of repayment in Pounds sterling (P130-31, R/A). He submitted that there is nothing on the face of the issues on the pleadings and decided by the trial Court which gives any indication of *ex facie* illegality of the transaction which gave rise to the dispute. That it is too settled a principle of our adjectival law to require citation of authorities that courts are bound by the issues raised by the parties and a party would not be allowed to change his case as it moves up to appellate ladder. In the same vein, it is not open to any party to litigation to introduce a new issue *en appeal*, except with leave of the appellate court. See *Lasisi Ogbe v. Sule Asade* (2009) 18 NWLR (Pt. 1172) 106. B C

Mr. Okoli of counsel went on to contend that the Moneylender's Law of Lagos State which Appellants are now relying on was not raised at all in the trial court. That it is clear from the tenor of the Court of Appeal's judgment that its consideration of the issue was only as *obiter dicta* and even then its analysis and conclusion on the point remain unimpeachable regardless of the Appellants' argument. D

Learned counsel for the Respondent said that the facts in this case are squarely within the principle lucidly reiterated by the Supreme Court in *Ibrahim v. Osim* (1988) 3 NWLR (pt.82) 357, that a party like the present Appellants cannot on the basis of alleged illegality repudiate its obligation under a contract it had benefited from. He concluded for the Respondent by saying that this is not a case where the Supreme Court can deviate from the concurrent findings of the two Courts below as the findings are not perverse nor was there a miscarriage of justice. He cited *Enang v. Adu* (1981) 11 - 12 SC 25; *Akeredolu v. Akinremi* (1989) 3 NWLR (pt. 108) 164; *Ibodo v. Enarofa* (1980) 5 - 7 SC 42. E F

This pillar of support of the Appeal, based upon the point now canvassed by the Appellants that the trial Court should have dismissed the action *suo motu* as the suit was unenforceable because of its contravention of the provisions of the Money Lenders Laws of Lagos State. There is nothing before any of the Courts below or this one in support of any illegality in the transaction between the parties, an arrangement from which the Appellants derived immense benefit only to turn around on being called upon to repay, to raise the point of the transaction not meeting the requirements of the Money Lenders Act, Section 2 (c) precisely. It is note worthy that nothing in the G H

pleading made allusion to the fact of illegality nor the evidence for that matter and for it to be entertained at the Court below being a fresh issue leave of court was a necessity and that was neither sought for nor obtained. Firstly, the jurisdiction would not enure on the Court of Appeal to entertain such a proposition in the name of an appeal which can be described as one at large. Also, a non starter, assuming the condition precedent for raising the matter of the contract's illegality was in place, is the fact that the Appellants having effectively derived the benefit of the transaction leading to the suit subject matter of this appeal are estopped from disclaiming their non obligation on account of the transaction being an illegal one. Apart from the reprehensible nature of the denunciation by them at this late hour, the law of contract has not given them the leg to be so favoured. I rely on *Veritas Insurance v. Citi Trust Investment Ltd* (1993) NWLR (pt.281) 3491; *Ibrahim v. Osim* (1988) 3 NWLR (Pt. 82) 357 - 379. This issue is also resolved in favour of the Respondent and against the Appellants.

From the foregoing and the better arranged lead judgment of my learned brother, Saifullah Muntaka-Coomassie JSC; I uphold the concurrent findings of the two Courts below as I dismiss the appeal. I abide the consequential orders in the lead judgment.

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